Chase Perdana Sdn Bhd (formerly known as Chew Piau Bhd) v CIMB Bank Bhd

HIGH COURT (KUALA LUMPUR) — MOTION NO D1–22–779 OF 2000
NALLINI PATHMANATHAN JC
18 SEPTEMBER 2009

Contract — Damages — Liquidated damages — Whether assessment of damages under s 74 of the Contracts Act 1950 relevant where claim is for liquidated sum

Contract — Damages — Mitigation — Whether mitigation of losses relevant where claim is for liquidated sum — Whether plaintiff's conduct in assisting defendant amounted to failure to mitigate its loss

Contract — Damages — Remoteness — Whether remoteness of damages in tort relevant where claim is for liquidated sum

Contract — Letter of undertaking — Breach — Whether defendant in breach of letter of undertaking — Interpretation of terms of letter of undertaking — Words and terms in letter of undertaking to be accorded their natural and ordinary meaning — Defendant in breach of express terms of letter of undertaking — Whether plaintiff's failure on insisting on its strict legal rights earlier amounted to break in chain of causation

The plaintiff entered into a construction agreement with one FB Development for the construction of a housing project. The contract sum was secured by an irrevocable guarantee issued by the defendant to pay the plaintiff the sum of RM64,000,000 ('the guaranteed amount') and an irrevocable letter of undertaking ('LOU') also issued by the defendant to pay the plaintiff the balance sums out of certain project accounts. The final contract sum was adjusted to RM61,771,270.98. On deduction of the retention sum, the amount payable to the plaintiff was RM58,682,707.43. The certificate of practical completion ('CPC') was issued by the architect and presented to the defendant. The defendant only paid the plaintiff RM48,953,114.54. The plaintiff claimed the unpaid balance of RM10,241,676.73 under the LOU. The defendant refused to pay on the grounds that: (i) the LOU was only enforceable with respect to sums that had

been set aside by the defendant in accordance with its terms and there were no available funds that were capable of being set aside as provided for in the LOU; and (ii) the defendant's obligation to pay the plaintiff only arose out of available sums set aside from the project accounts and since there were no available sums set aside there were no sums from which the defendant was obliged to make payment to the plaintiff. The issues that arose for consideration were: (a) the construction of the LOU; (b) whether there were sufficient funds in the project accounts to enable monies to be set aside for purposes of the LOU; (c) whether there was a break in the chain of causation disentitling the plaintiff to damages if the defendant was in breach of the LOU; (d) the plaintiff's failure to mitigate loss; and (e) whether the plaintiff could claim the balance from the defendant under the LOU.

Held, allowing the plaintiff's claim with costs:

(1) The defendant was obliged under the terms of the LOU to set aside 'such sums' being the monies in the project accounts which were not required to be applied in payment of sums due to it. It clearly envisaged that there had to be monies available in the project accounts which were not due to it, before such monies may be set aside. In accordance with the law relating construction of contracts, the LOU was to be accorded its natural and ordinary meaning given the context and factual matrix of the contract (see paras 49–51).

(2) The defendant failed to show that the monies withdrawn by the defendant were monies due to it from time to time. The defendant produced no accounts or other evidence to show the nature or purpose of the withdrawals from the project accounts. Further, the defendant conceded that no monies were set aside as required by the LOU, as the defendant chose to reserve such balances for future sums due to it. As such the defendant was in breach of the express terms of the LOU. The plaintiff had proved its case on a balance of probabilities (see para 65).

(3) The CPC specified the amount due to the plaintiff. Therefore, there was no reason to assess damages here. The issue of assessment of damages under s 74 of the Contracts Act 1950 or applying the test of remoteness of damages in tort were not relevant here since the claim was for a liquidated sum (see para 69).

(4) The plaintiff's alleged 'failure' to insist on its strict legal rights under the BG for payment of the full sum in order to assist the defendant when it was, like other banks in 1998, suffering difficulties did not create a 'break in the chain of causation'. The plaintiff's agreement to wait for full payment did not amount to an 'intervening' act (see para 70(b)).

(5) As the plaintiff's claim was for a specified or liquidated sum under the LOU, the issue of mitigation did not arise. The plaintiff's conduct in assisting the defendant at that point in time did not amount to a failure to mitigate its loss (see para 72).

(6) The total monies deposited over the years 1995–1999 was in the region of RM40.6m. If monies had been set aside as required under the LOU, there would have been sufficient funds to meet the plaintiff's claim (see para 73).

[Bahasa Malaysia summary

Plaintif menandatangani satu perjanjian pembinaan dengan FB Development untuk pembinaan sebuah projek perumahan. Jumlah kontrak itu telah dijamin oleh satu jaminan tidak boleh batal yang dikeluarkan oleh defendan untuk membayar plaintif sejumlah RM64,000,000 ('jumlah terjamin') dan surat akujanji tidak boleh batal ('SATBB') yang juga dikeluarkan oleh defendan untuk membayar plaintif jumlah baki daripada akaun-akaun projek tertentu. Jumlah kontrak terakhir diselaraskan kepada RM61,771,270.98. Selepas potongan jumlah simpanan, jumlah yang terbayar kepada plaintif adalah RM58,682,707.43. Sijil siap praktikal ('SPP') dikeluarkan oleh arkitek dan diserahkan kepada defendan. Defendan hanya membayar plaintif sebanyak RM48,953,114.54. Plaintif menuntut baki jumlah yang terbayar RM10,241,676.73 di bawah SATBB. Defendan enggan membayar atas alasan-alasan bahawa: (i) SATBB hanya boleh dikuat kuasakan terhadap jumlah yang telah diketepikan oleh defendan selaras dengan syarat-syaratnya dan tidak terdapat dana yang boleh diketepikan seperti diperuntukkan dalam SATBB; dan (ii) kewajipan defendan untuk membayar plaintif hanya timbul daripada jumlah yang telah diketepikan daripada akaun-akaun projek tersebut dan memandangkan tiada jumlah yang telah diketepikan maka tidak terdapat jumlah yang mana defendan berkewajiban untuk membuat bayaran kepada plaintif. Isu-isu yang timbul untuk pertimbangan adalah: (a) pentafsiran SATBB; (b) sama ada terdapat wang yang mencukupi dalam akaun-akaun projek bagi membolehkan wang diketepikan bagi tujuan SATBB; (c) sama ada wujudnya rantaian penyebab yang putus yang menghilangkan hak plaintif bagi ganti rugi jika defendan mungkir SATBB tersebut; (d) kegagalan plaintif mengurangkan ganti rugi; dan (e) sama ada plaintif boleh menuntut baki daripada defendan di bawah SATBB.

Diputuskan, membenarkan tuntutan plaintif dengan kos:

(1) Defendan diwajibkan di bawah syarat-syarat SATBB untuk mengenepikan 'jumlah sedemikian' yang merupakan wang dalam akaun projek tersebut yang tidak akan digunakan dalam pembayaran jumlah

yang terhutang kepadanya. Jelas digambarkan bahawa ia semestinya mempunyai wang dalam akaun projek tersebut yang tidak perlu dibayar kepadanya, sebelum wang sedemikian boleh diketepikan. Selaras dengan undang-undang berkaitan pentafsiran kontrak, SATBB akan diberikan makna semula jadi dan biasa dalam konteks dan matriks faktual kontrak (lihat perenggan 49–51).

(2) Defendan gagal menunjukkan bahawa wang yang dikeluarkan oleh defendan adalah wang yang perlu dibayar kepadanya dari semasa ke semasa. Defendan tidak mengemukakan akaun atau bukti lain untuk menunjukkan sifat atau tujuan pengeluaran-pengeluaran tersebut daripada akaun-akaun projek tersebut. Selanjutnya, defendan bersetuju bahawa tiada wang diketepikan seperti dikehendaki oleh SATBB, kerana defendan memilih untuk merizabkan baki-baki sedemikian untuk jumlah yang perlu dibayar kepadanya pada masa depan. Oleh itu defendan memungkiri syarat-syarat nyata SATBB. Plaintif telah membuktikan kesnya atas satu imbangan kebarangkalian (lihat perenggan 65).

(3) SSP menentukan jumlah perlu dibayar kepada plaintif. Oleh itu, tidak ada sebab bagi mentaksir ganti rugi. Isu taksiran ganti rugi di bawah s 74 Akta Kontrak 1950 atau menggunakan ujian kerosakan luar duga dalam tort tidak relevan di sini kerana tuntutan adalah untuk jumlah tertentu (lihat perenggan 69).

(4) 'Kegagalan' yang didakwa oleh plaintif untuk berkeras terhadap hak undang-undangnya di bawah BG untuk pembayaran jumlah sepenuhnya untuk tujuan membantu defendan apabila, seperti bank-bank lain pada 1998, ia menghadapi kesukaran-kesukaran tidak mengakibatkan 'rantaian penyebab yang putus'. Perjanjian plaintif untuk menunggu pembayaran penuh bukanlah satu perbuatan 'menghalang' (lihat perenggan 70(b)).

(5) Memandangkan tuntutan plaintif adalah bagi jumlah ditentukan atau tertentu di bawah SATBB, isu mitigasi tidak timbul. Kelakuan plaintif dalam membantu defendan pada satu ketika bukanlah satu kegagalan bagi mengurangkan kerugiannya (lihat perenggan 72).

(6) Jumlah wang yang dimasukkan sejak tahun 1995 hingga 1999 adalah dalam lingkungan RM40.6 juta. Jika wang telah diketepikan seperti dikehendaki di bawah SATBB, tentunya ada dana yang mencukupi bagi memenuhi tuntutan plaintif (lihat perenggan 73).]

Notes

For a case on breach, see 3(1) *Mallal's Digest* (4th Ed, 2006 Reissue) para 4325.

For cases on liquidated damages, see 3(1) *Mallal's Digest* (4th Ed, 2006 Reissue) paras 3312–3335.
For cases on mitigation, see 3(1) *Mallal's Digest (*4th Ed, 2006 Reissue) paras 3359–3376.
For cases on remoteness, see 3(1) *Mallal's Digest* (4th Ed, 2006 Reissue) paras 3392–3398.

Cases referred to

Bank of Credit and Commerce International SA v Ali & Ors [2002] 1 AC 251, HL (refd)
Barclays Bank plc v Weeks Legg & Dean (a firm); Barclays Bank plc v Layton Loughter & Co (a firm); Mohamed v Fahiya & Ors (NE Hopkin John & Co (a firm), third party) [1998] 3 All ER 213, CA (refd)
Beoco Ltd v Alfa Laval Co Ltd & Anor [1995] QB 137, CA (not folld)
Jumbo King Ltd v Faithful Properties Ltd & Ors [1999] 2 HKC 507, CA (refd)
Michael C Solle v United Malayan Banking Corporation [1986] 1 MLJ 45, FC (refd)
Sri Minal Construction Sdn Bhd v Hong Kong Bank Malaysia Berhad [2007] 7 MLJ 367; [2007] 9 CLJ 579, HC (Not folld)
Stockton Malleable Iron Co, Re (1875) 2 Ch D 101 (refd)
Tan Sri Khoo Teck Puat & Anor v Plenitude Holdings Sdn Bhd [1994] 3 MLJ 777, FC (refd)

Legislation referred to

Contracts Act 1950 s 74
Evidence Act 1950 s 103

Alvin Tang (Syarihah Razman with him) (Shook Lin & Bok) for the plaintiff.
LK Mak (LC Lok with him) (Kadir Andri & Partners) for the defendant.

Nallini Pathmanathan JC:

INTRODUCTION

[1] The plaintiff, Chase Perdana Sdn Bhd ('the plaintiff') entered into a construction agreement with one FB Development (Batu Pahat) Sdn Bhd on 17 December 1994. The work comprised completing the construction of a housing estate known as Banang Heights ('the project') for the sum of RM76,719,081.80 ('the contract sum'). This contract sum was secured by an irrevocable guarantee issued by Bank Bumiputra Malaysia Bhd ('BBMB') to pay the plaintiff the sum of RM64,000,000 ('the guaranteed amount') and an irrevocable letter of undertaking also issued by BBMB to the plaintiff to pay the plaintiff out of the project accounts of Safuan Plaza Sdn Bhd, Reclamation Development Sdn Bhd, FB Development Sdn Bhd and PDLD Land Sdn Bhd ('the project accounts') the balance of RM12,719,081.80. The

payment of the contract sum and the provision of the irrevocable guarantee and undertaking are stipulated in special condition 3.2 of an addendum to the construction contract.

[2] BBMB duly issued both the security documents. BBMB's assets and liabilities were subsequently vested in Bumiputra Commerce Bank Bhd ('BCB'). BCB was subsequently acquired by CIMB Bank Bhd, the defendant here. On completion of the project the final contract sum was adjusted to the sum of RM61,771,270.98 ('new contract sum'). On deduction of the retention sum the amount payable to the plaintiff for work done was RM58,682,707.43. The terms of the construction contract provide that payment is due to the plaintiff within 14 days from the date of the issuance of the certificate of practical completion ('CPC') by the architect. The CPC was issued by the architect on 24 November 1998 and presented to the defendant on 26 November 1998. BBMB has since paid the plaintiff the sum of RM48,953,114.54 (being the sum of RM51,529,594.25 less the retention sum of RM2,576,479.71 being BBMB's prorated liability for the new contract sum under the irrevocable letter of guarantee).

[3] The unpaid balance of the new contract sum is RM10,241,676.73 which the plaintiff claims under the irrevocable letter of undertaking. The plaintiff has demanded the sum of RM9,729,592.89 after deduction of the retention sum of 5%. The defendant has not paid the plaintiff the sum claimed, stating, inter alia, that:

(a) the irrevocable letter of undertaking is only enforceable with respect to sums that have been set aside by the defendant in accordance with its terms; at all material times there were no available funds that were capable of being set aside as provided for in the said letter of undertaking;

(b) the defendant's obligation to pay the plaintiff only arises out of available sums set aside from the project accounts; as there were no available sums set aside there are no sums from which the defendant is obliged to make payment to the plaintiff; and

(c) full and final settlement has been reached between the plaintiff and BBMB in respect of all claims of the plaintiff including those under the irrevocable letter of undertaking by reason of payments previously made.

ISSUES

[4] The issues that arise for consideration are as follows:

(a) the construction of the irrevocable letter of undertaking ('LOU');

(b) whether there were sufficient funds in the project accounts to allow for/enable monies to be set aside for purposes of the LOU;

(c) if the defendant was in breach of the LOU was there a break in the chain of causation disentitling the plaintiff to damages for such breach;

(d) the plaintiff's failure to mitigate its loss; and

(e) whether the plaintiff is entitled to claim the sum of RM9,729,592.89 from the defendant under the irrevocable LOU.

THE TRIAL

[5] At the outset of the trial, learned counsel for the plaintiff, Mr Alvin Tang and Mr LK Mak for the defendant advised the court that the title of the action required amendment to reflect the current status of the litigants. The plaintiff is no longer a public listed company but is a private limited company known as Chase Perdana Sdn Bhd. As for the defendant, it should read CIMB Bhd to reflect the current ownership of the bank. The application for those oral amendments was allowed and the amendments duly incorporated.

[6] The plaintiff and the defendant called upon one witness each to testify. Tan Sri Datuk Dr Mohan a/l MK Swami ('PW1') testified on behalf of the plaintiff while Mr Bahardin Abu Hasan ('DW1') testified on behalf of the defendant.

THE SALIENT FACTS

[7] The salient facts appear from the testimony of both witnesses above. PW1 who is the executive chairman of the plaintiff explained the nature of the plaintiff's claim. The plaintiff is in the construction and development business. The sum of RM9,729,592.89 is claimed under a letter of undertaking issued by BBMB. It represents the balance sum due after deduction of the retention sum in respect of a project known as the Banang Heights Project constructed by the plaintiff as main contractor.

[8] The claim is made against the defendant because all BBMB's liabilities were vested in the defendant vide vesting order dated 3 September 1999. PW1 set out the background for the construction of the Banang Heights Project ('the project') explaining that the owners were one FB Development (Batu Pahat) Sdn Bhd. The plaintiff in turn was appointed the contractor for the project pursuant to a letter of award and acceptance dated 19 October 1994. The agreed contract sum for the project was a fixed lump sum price of RM76,719,081.80 ('the original contract sum').

[9] The payment provisions for the contract sum were set out in cl 3 of the addendum to the articles of agreement/conditions of contract. Clause 3 comprises cll 3.1 and 3.2 which provide as follows:

> 3 Certificate and Payment
>
> 3.1 Notwithstanding any provision or provisions to the contrary as contained in the Conditions, the parties hereto agree that the Contract Sum, less the Retention Sum, and adjusted as the case may be pursuant to the foregoing Special Condition 2.1, shall only be paid by the Employer to the Contractor in one lump sum within fourteen (14) days of the date of a claim for the Contract Sum has been submitted by the Contractor following the issue by the Architect of the Certificate of Practical Completion pursuant to clause 15(1) of the Conditions.
>
> 3.2 Payment of the Contract Sum *shall be secured* as follows:
>
> (a) by an irrevocable guarantee to be issued by Bank Bumiputra Malaysia Berhad ('BBMB') to the Contractor to pay the Contractor the sum of Ringgit Malaysia Sixty Four million (RM64,000,000/=) ('the Guaranteed Amount') in accordance with Special Conditions 3.1; and
>
> (b) *by an irrevocable undertaking to be given by BBMB to the Contractor to pay out of the project accounts to be maintained with BBMB of Safuan Plaza Sdn. Bhd., Reclamation Development Sdn. Bhd., FB Development (Batu Pahat) Sdn. Bhd. and PDLD Land Sdn Bhd the balance sum of Ringgit Malaysia: Twelve Million Seven Hundred and Nineteen Thousand Eighty One and Sen Eighty Only (12,719,081.80) ('the Balance Amount') in accordance with Special Condition 3.1* (Emphasis added.)

[10] PW1 testified that he understood from cl 3.2 that the payment of the contract sum was secured by BBMB by the issuance of both the irrevocable guarantee ('BG') and the irrevocable LOU. The BG guaranteed payment of 83.4% of the contract sum while the balance sum of RM12,719,081.80 or 16.58% was secured by the LOU.

[11] BBMB duly issued the BG and the LOU both dated 10 February 1995. Paragraphs 2 and 3 of the LOU which comprise the focus of this dispute provide that BBMB is irrevocably authorised, out of moneys in the project accounts maintained with four different companies which are not required to be applied in payment of sums due to BBMB from time to time, to set aside such sums from time to time so as to provide for the payment to the plaintiff within 14 days of issue of the CPC the sum of

RM12,083,127.80. Clause 3 expressly provides that BBMB will set aside such monies and make payment within 14 days of issue of the CPC. The precise terms of these clauses are considered further on in the judgment.

[12] PW1 testified that he understood this clause to provide that BBMB irrevocably undertakes to set aside sums from time to time out of monies in the project account to provide for the payment of the sum of RM12,083,127.80 within 14 days of issuance of the certificate of practical completion ('CPC'). The retention sum was to be made available within 14 days of the architect's issuance of the certificate of making good defects ('CMGD'). He further testified that the plaintiff had understood that as and when funds were injected or deposited into the project accounts, BBMB would set aside from time to time, monies or sums for payment to the plaintiff within 14 days of the presentation of the CPC.

[13] PW1 explained that the project was completed on 24 November 1998. The CPC was issued on that day, ie 24 November 1998, the final contract sum amounted to RM61,771,270.98 ('the final contract sum') which was less than the contract sum. After deduction of the retention sum of 5%, the amount due to the plaintiff was RM58,682,702.43. By letter dated 26 November 1998, the plaintiff presented the CPC to BBMB and claimed the entire final contract sum of RM58,682,702.43. The plaintiff did this, according to PW1 because the final contract sum was well within the maximum limit of RM64m secured by the irrevocable guarantee.

[14] The entire sum however was not paid. Subsequent to the issuance of the letter, towards the end of 1998, PW1 met up with Dato' Halim bin Muhamat who was the chief operating officer of BBMB. PW1 testified that Dato' Halim informed him that as BBMB was undergoing a 'credit crunch' it was unable to make full payment of the entire contract sum. He did however assure PW1 that the full sum would eventually be paid, albeit on a staggered basis. After this meeting, BBMB wrote a letter dated 27 March 1999 to the plaintiff proposing to make a payment of 83.42% of the final contract sum under the irrevocable guarantee. This amounted to RM48,953,114.54.

[15] According to PW1, the plaintiff agreed to this proposal because of Dato' Halim's assurances that the entire final contract sum would eventually be paid although on a staggered basis. By letter dated 27 April 1999, the plaintiff wrote to BBMB confirming acceptance of the payment of a total sum of RM51,529,594.25 as being in full and final settlement of its claim against the bank under the BG. After deduction of the retention sum the amount payable under the BG would amount to RM48,953,114.54. BBMB vide letter dated 28 April 1999 advised the plaintiff that the sum of

RM48,953,114.54 had been remitted to the plaintiff's account. PW1 was asked in the course of examination-in-chief whether the aforesaid sum amounted to a full and final settlement of monies due to it under both the BG and the LOU as contended by the defendant. PW1 denied this stating that in the correspondence between the plaintiff and BBMB, it was clearly indicated that the payment was only in respect of the BG.

[16] On 18 May 1999 and subsequently on 1 June 1999, the plaintiff wrote to the BBMB seeking payment of the monies due under the LOU. There was no response from the BBMB. In the course of examination-in-chief, PW1 explained that he rejected BBMB's stance that there were insufficient funds in the project accounts to make payment to the plaintiff because from a review of those accounts, his calculations showed that deposits exceeding RM40m were injected into the project accounts for the period between 20 February 1995 and 30 June 1995. This he contended showed that there were more than sufficient funds available to be set aside by BBMB, particularly since all these funds were deposited only after issuance of the LOU dated 10 February 1995. However no funds were set aside as specified in the LOU.

[17] PW1 concluded his testimony in examination-in-chief by explaining that as far as the plaintiff was concerned the BG and LOU were issued to ensure that it would be paid upon completion of the project. If the securities were conditional as alleged by the defendant, they would be worthless. The plaintiff agreed to accept payment of the final contract sum on a staggered basis on the assurance and understanding that full payment would eventually be made.

[18] In the course of cross-examination, PW1 was asked whether the plaintiff had been satisfied of FB Development's financial standing before undertaking the construction work. PW1 stated that the plaintiff was satisfied of FB Development's financial standing coupled with the security given by BBMB. PW1 was also asked why no initial claim was made under the LOU but instead under the BG. He testified that initially the entire claim was made under the BG because the guarantee was for a sum of RM64m which covered the entire sum claimed by the plaintiff. It was put to him that the claim was so made because it was easier to make a claim under the BG. PW1 however maintained that the plaintiff did so simply because the BG encompassed the entire sum claimed.

[19] It was also put to PW1 that the plaintiff had agreed to accept the sum of RM48m above in full and final settlement of its entire claim. PW1 rejected this maintaining that the chief operating officer of BBMB, Dato' Halim Muhamat had assured him that the full amount would be paid but in stages.

In view of the acute financial crisis that was prevalent in 1998, the plaintiff decided to take the RM48m first and then wait for the balance. He was also asked whether he knew what the rate of 'take-up' was for the project. PW1 stated that all the housing units were completely sold out. He was then asked why he agreed to wait for a further period to make the claim for the balance of the contract sum. PW1 explained that this was to accommodate BBMB's financial issues, and that the lesser sum was accepted as an interim measure. He explained that the lesser sum was in full and final settlement of the BG, but not the LOU.

[20] PW1 was asked whether he knew that there were always insufficient funds in the project accounts. He maintained that he was not made aware of this fact until after demands were made for payment under the LOU. It was then put to him that the LOU envisaged that monies were to be applied in payment of sums due to the bank first. PW1 did not respond to this, stating that he did not know or understand the detailed terms of the loans given to Safuan by BBMB.

[21] It was also put to PW1 that there was nothing in the addendum to the articles that required the bank to pay the sums due to the plaintiff from FB Development. To this, PW1 replied that notwithstanding the lack of any such requirement, the bank had paid them RM48m. PW1 was then asked whether the plaintiff had looked to FB Development for payment upon issuance of the CPC. He explained that it was his understanding that the bank would release the payment. When pressed further he answered that he presumed that the plaintiff did, but that they were referred to the bank.

[22] In re-examination, PW1 explained that the plaintiff would not have undertaken the project without progress payments if not for the LOU and BG provided for by BBMB. He further explained that the plaintiff agreed to wait for deferred payment because of his relationship with BBMB. He had been the medical doctor for BBMB when he was practicing in Kota Kinabalu. The chief operating officer, Dato' Halim was his patient and friend and when he sought to procure payment he was referred by the chairman of BBMB to Dato' Halim who asked him to agree given the financial crisis that the banks were going through at the time. He explained that that appeared acceptable to him as BBMB was then the nation's largest bank.

[23] After PW1 had concluded his testimony, the plaintiff closed its case.

[24] The defendant also called only one witness, Mr Bahardin bin Abu Hasan ('DW1'). DW1 had joined BBMB on 16 December 1974 and worked there until 2006. At the material time, he was the branch head of credit at BBMB's Kampung Baru branch. He was aware of, and had conduct of, inter

alia, the Safuan Group Bhd's banking facilities. He explained that banking facilities were granted to Safuan Group Bhd in the sum of RM492,100,000 in respect of several projects. The facility was afforded vide three different types of facilities. For the purposes of this dispute, it is relevant that a bank guarantee facility in the amount of RM271m was utilised by BBMB to guarantee payment to turn-key contractors to complete their projects.

[25] DW1 went on to explain the provision of the BG by BBMB to the plaintiff for FB Development (Batu Pahat) Sdn Bhd. He also explained that the LOU came about as a result of Safuan Plaza Sdn Bhd, Reclamation Development Sdn Bhd FB (Batu Pahat) Sdn Bhd and PDLD Land Sdn Bhd authorising BBMB to set aside monies not required to pay BBMB from time to time. He went on to explain that he did not at any time set aside monies out of the project accounts because there were never sufficient sums in the project accounts even to pay the sums due and owing to BBMB. As such he maintained that there was no occasion to act on the authority given by these four customers to BBMB to set aside monies.

[26] DW1 testified that BBMB was informed of the completion of the project vide the plaintiff's letter of 26 November 1998 whereby it made a demand on the guarantee relying on the CPC issued by the architect. He went through BBMB's responses vide their letters of 27 March 1999 and 28 April 1999 whereby BBMB agreed to and did remit payment of RM48,953,114.54 to the plaintiff. He acknowledged that the plaintiff had on 18 May 1999 written once again to BBMB making claim under the LOU. He maintained that the bank did not reply to this letter making claim under the LOU as there was no obligation on the part of BBMB to make such payment. This was, he maintained, because there were no monies set aside as there had been no monies available to do so. He also stated that the earlier sum remitted to the plaintiff constituted full and final settlement in respect of all claims under the project accounts.

[27] With reference to the project accounts, DW1 maintained that deposits were made from time to time but that these were insufficient to pay off the loans outstanding under the facilities agreement. He concluded his examination-in-chief by stating that the amount owing to BBMB from the Safuan Group as of 1999 was at least RM124m.

[28] In the course of cross-examination, DW1 concurred with learned counsel for the plaintiff that the BG and LOU were issued by BBMB as security for the contract sum. Referring specifically to the LOU, DW1 agreed that BBMB was required to set aside monies from time to time, ie whenever possible, but qualified that by stating that it referred to monies 'not required by the bank'. He maintained that BBMB did not set aside any monies at all

because there was no extra money to set aside. He was then taken through the project accounts. DW1 was unable to approximate how much money had been deposited in the project accounts. When he was referred specifically to the summary of accounts between February 1995 and June 1999, he did not agree that the balance reflected for the month of February 1995 showed a surplus of RM384,831.05. He maintained that this balance had to be utilised 'for the loan'. DW1 went on to explain that this balance was not a surplus fund from which monies could be set aside because BBMB was supposed to take the money towards repayment of the Safuan loan. When it was put to him that as it was a balance and ought to have been set aside, DW1 maintained that it was only to be set aside 'if it was not required by the bank' as stated in the LOU.

[29] He was then queried as to why the money wasn't taken out by the bank if it was so required. His answer was that amounts to be taken out had to be confirmed by the financial advisor of the bank at the time. As such he was unable to confirm that the sum of RM384,831.05 was in fact taken out for payment to BBMB. He was further unable to confirm when or how often monies were taken out of the project accounts for purposes of 'repayment' of the loan. He concurred that irrespective of how much money there was in the account, BBMB could just assume that the money was for themselves. He also concurred that BBMB could unilaterally decide what monies to set aside under the LOU. DW1 maintained that BBMB would only set aside monies when the amounts due to the Safuan Group were satisfied.

[30] However in this context, DW1 was unable to confirm the repayment due to Safuan, albeit on a monthly or yearly basis. This was primarily because DW1 had no documents or records from which he could ascertain these figures. However as the manager specifically in charge of this account he explained monies from the project accounts would be utilised to pay parties approved by the bank and financial advisor of the Safuan Group. When approval had been procured from these parties, monies would be taken out of the project accounts. DW1 concurred that this explanation was true for all entries showing balances in the project accounts statements throughout the relevant period. However in the absence of any other documents, he was unable to disclose to whom or for what purpose these balances amounting to some RM40.6m had been utilised.

[31] He agreed that if monies had been set aside from the project accounts on a monthly basis, then based on the summary of accounts, there probably would have been sufficient funds for BBMB to pay the plaintiff. He insisted however that the project accounts were managed by a project manager and that any and all withdrawals were authorised. BBMB, he maintained, would never simply take out monies for any other purpose. However he could not

produce or refer to any documents to substantiate his answer, stating that all documents had been passed over to Danaharta. DW1 also explained that although four different project accounts comprised the total fund, only Safuan Plaza and the project generated funds. None of the other projects, according to him generated any funds.

[32] DW1 was then cross-examined on the settlement reached between the parties as he had testified. He maintained that he did not know how settlement was reached, but said that he had received a letter advising him so. He could not however refer to the letter as he maintained it was contained in a file given to Danaharta. It was evident that not being involved directly in any meetings, DW1 had no knowledge of whether or not the matter was settled. In any event his testimony was that the settlement reached between the parties was solely in relation to the BG and not the LOU. He also concurred that his statement in evidence-in-chief that BBMB remitted the sum of RM51m in full and final settlement of the entire sum due to the plaintiff was erroneous because the actual sum remitted was RM48.9m and that it was not in full and final settlement of the entire sum. DW1 also confirmed that when he left the bank in 2006 the retention sum due to the plaintiff had not been paid.

[33] DW1 was then cross-examined on the terms of the LOU. He concurred that there was nothing in the letter requiring a financial controller to authorise the withdrawal of monies from the project accounts. He further concurred that by use of the words 'irrevocably authorised' monies could be set aside without the approval of a financial controller. He further agreed that if there were excess monies which BBMB failed to set aside this would mean that they had failed to comply with their obligations. DW1 was referred to the words 'which are not required to be applied in payment of sums due to us from time to time' in the LOU and asked whether payments were due every month or otherwise. Once again however DW1 was unable to give a clear and full response. He stated that monies were due every month or every three months as there were numerous facilities accorded to the Safuan Group with different drawdown dates for the different facilities so that repayments fell due at various times during the month. He maintained that unless he had documents pertaining to the particular accounts he would not be able to give anything other than generic answers.

[34] DW1 was referred specifically to the project accounts and asked to point out which payments were made to BBMB. Being unable to do this, he was then asked whether the words 'makluman debit' appearing on those statements represented payments to BBMB. DW1 said that they might but that he was unable to confirm this without having sight of the document itself. As a consequence he was unable to confirm that all the debit advice

entries reflected payments taken towards repayment of the loan due to BBMB. He stated however that it was likely to be so. When asked whether he was guessing, he explained that he was the one who was directly in charge and that he had signed all papers debiting the account. As such while he was not entirely sure, he was of the opinion that those debits went towards payment of interest and principal due to BBMB and towards payment of the financial consultants. When it was put to him that the words 'makluman debit' would also reflect inter bank transactions with third parties, he agreed. In short he was unable to confirm with any degree of certainty that the monies debited in the project accounts had gone towards payment of monies owed to BBMB.

[35] Next, DW1 was referred to individual statements at the end of every month showing a balance of monies remaining for that month. It was put to him that if BBMB had taken out the monies due to them for that month, and there was still a balance amount, then monies should have been set aside for the LOU. He however said that this was not the case because those monies had to be reserved or kept for payment of interest due the following month. DW1 agreed that the bank kept aside payments not only for sums due but also for payment that were due in the future.

[36] He was then queried as to where in the facilities agreement between BBMB and Safuan Holdings Bhd, BBMB was given authority to deduct monies from the project accounts. DW1 referred to cll 7.01 and 10.02. However neither of these clauses refers to such authorisation. When pressed further on this point, DW1 conceded that there was nothing in the facilities agreement that allowed the bank to deal specifically with the monies in the project accounts.

[37] DW1 was then referred to statements of accounts for Safuan Holdings Bhd under the facilities agreement. It was put to DW1 that there was no indication in those accounts of repayment from the project accounts for the periods stated in those accounts and he agreed. Going back to the project accounts, it was put to DW1 that a sum of about RM40.6m was withdrawn from those accounts between February 1995 and June 1996. DW1 was asked whether this entire sum was applied towards BBMB's payments. DW1 was unable to confirm this to be the case. He finally stated that he was only able to conclude that a large portion went towards 'makluman debit' which meant that it could have gone towards payments to BBMB as well as other third parties.

[38] In re-examination DW1 reiterated that there was a distinction to be made between surplus balance in the account and surplus funds. The fact that there was a surplus balance in the account did not mean that there were

surplus funds. Surplus funds would only be available after taking into consideration the repayment of the loan amount. He also stated that any funds available in the project accounts had to be applied towards repayment of the loan as a priority. He recalled that the amount outstanding at the time was in the region of RM400m. The cash flow through the project accounts was insufficient to support a loan of that size. That was why no monies were set aside for the LOU. He estimated that of the RM40.6m going through the project accounts, 90% went towards repayment of BBMB's loan. Despite this the Safuan loan became a non-performing loan.

[39] After DW1 had completed his testimony, the defendant closed its case.

Issue (a): The construction of the irrevocable letter of undertaking

[40] As set out above the relevant portions of the LOU are in paras 2 and 3 of the LOU, exh P4. The said clauses provide as follows:

> 2 We have been irrevocably authorized that out of moneys in the Project Accounts maintained with us by Safuan Plaza Sdn. Bhd, Reclamation Development Sdn. Bhd. and FB Development (Batu Pahat) Sdn. Bhd. and PDLD Land Sdn. Bhd. which are not required to be applied in payment of sums due to us from time to time, we are to set aside such sums from time to time so as to provide for the payment to you within 14 (fourteen) days of the issue by the Architect of the Certificate of Practical Completion ('the Payment Date') of the sum of RM12,083,127.80 (ringgit Malaysia: Twelve million eighty-three thousand one hundred and twenty-seven and cents eighty) ('the Net Amount') being the Balance Sum less the Retention sum of RM635,953/= or 5% of the Balance Sum as provided in Clause 30(3) of the Conditions and the Appendix to the Construction Contract.
>
> 3 We hereby irrevocably undertake to you that we will from time to time set aside such sums and out of the sums so set aside by us, we will:
>
> (a) On Payment Date, pay to you the Net Amount; and
>
> (b) Within 14 (fourteen) days of your presentation to us of the certificate issued by the Architect pursuant to Clause 30(4)(c) of the Conditions, pay to you the Retention Sum.

[41] How then is this undertaking to be construed? Learned counsel for the plaintiff submitted that the operative terms of the LOU are clear, unqualified and not made subject to any conditions in that cl 3 stipulates that BBMB irrevocably undertakes from time to time to set aside 'such' sums and make payment within 14 days of the issuance of the architect's CPC from such funds. 'Such sums' he maintained referred to such amounts from the project accounts as are needed to provide for payment to the plaintiff of the sum of RM12,083,127.80. He emphasised that undertakings had to be construed strictly and that they remained enforceable even if the promise is to do something which is outside the control of the person giving such undertaking. For this he relied on the law relating to solicitors' undertakings from *Cordery on Solicitors*. He further stressed that in construing the undertaking it was important to bear in mind the circumstances under which it was made, namely as security for the contract sum (see *Barclays Bank plc v Weeks Legg & Dean (a firm); Barclays Bank plc v Layton Loughter & Co (a firm); Mohamed v Fahiya & Ors (NE Hopkin John & Co (a firm), third party)* [1998] 3 All ER 213).

[42] It was further submitted that if the undertaking was subject to availability of funds, then it should have expressly provided so, which it does not. Further if sufficiency of funds to meet the undertaking was doubtful, the defendant should not have given an undertaking intended to operate as a security, citing in support from *Cordery on Solicitors* at para 910:

> If it is intended to restrict the undertaking in this way, a term to this effect must be included in the wording of the undertaking.

[43] Where there was an undertaking to pay out of a specified fund, he submitted, the law implies that the fund is sufficient for that purpose. As such the plaintiff maintained that the LOU was not dependant on the sufficiency of funds in the project accounts. The obligation of the defendant to make payment of the balance final contract sum was absolute by virtue of the irrevocable undertaking. As such it was contended that the defendant's failure to make such payment was a breach of the LOU.

[44] Learned counsel for the defendant, Mr LK Mak on the other hand contended otherwise. He submitted that in construing the LOU, the intent of the parties was central to the nature of the promise contained in the document. Clause 2 he submitted does not contain a promise to the plaintiff in that it does not say that the defendant will do anything for the plaintiff. Clause 2 he maintained, records the fact that the four companies named there had authorised the defendant to do two things in relation to each of their project accounts:

(a) set aside moneys from time to time required to pay the defendant; and

(b) where there are moneys not required to be used to pay sums due to the defendant it may be set aside for the plaintiff.

[45] Clause 2 was therefore more in the nature of a recital rather than a promise. Clause 3 contained the promise to the plaintiff whereby the defendant had promised to:

(a) set aside 'such' sums ie sums not required to be used to pay the defendant; and

(b) out of the sums set aside, pay the sums to the plaintiff on the payment date.

[46] Mr Mak goes on to submit that following from the wording of the LOU, the defendant was entitled to set aside from the project accounts monies due to it first, as a matter of priority before seeking to set aside monies for the plaintiff. He concedes that the defendant does not appear to have considered each month end, during the relevant period, whether from the balances in the project accounts, monies ought to have been set aside of the plaintiff. However the response to this is that the balances in the project accounts could not be considered to be excess funds available to be set aside because these monies had to be utilised to repay the loan taken by Safuan Group Bhd. As this loan was not fully repaid, there was no occasion for, nor obligation on the part of BBMB to set aside monies.

[47] An undertaking is defined in the *New Shorter Oxford English Dictionary* as, inter alia, 'a pledge, promise or guarantee'. To 'undertake' is defined in *Collins English Dictionary* as 'to contract to or commit oneself to (something) or (to do something)'. Vide the LOU dated 10 February 1995 entitled 'Construction Contract with FB Development (Batu Pahat) Sdn Bhd' BBMB irrevocably undertook in cl 3, that it would, from time to time:

(a) set aside 'such sums'; and

(b) out of the sums so set aside it would make the requisite payment to the plaintiff;

(c) within 14 days of the issue by the architect of the CPC;

(d) of the sum of RM12,083,127.80.

[48] What then does 'such sums' refer to? This is defined in cl 2 as 'the moneys in the project accounts maintained with BBMB by Safuan Plaza Sdn Bhd. Reclamation Development Sdn Bhd, FB Development (Batu Pahat) Sdn Bhd and PDLD Land Sdn Bhd which are not required to be applied in payment of sums due to it (ie BBMB) from time to time'.

[49] In other words, BBMB is obliged under the terms of the LOU to set aside 'such sums' being the monies in the project accounts which are not required to be applied in payment of sums due to it. BBMB therefore has a duty to set aside monies from time to time which are not due to it for the purposes of payment to the plaintiff. Put another way, BBMB has a continuing duty to set aside monies which are owed or owing to it as a debt.

[50] Given the construction above, I was unable to accept learned counsel for the plaintiff's contention that the undertaking was enforceable even if the promise is to do something which is outside the control of the person giving such undertaking. The law relating to solicitors' undertakings is to be distinguished from the present LOU as the rules relating to solicitors' undertakings is more stringent. So to contend that the LOU was enforceable for example where there were no monies available in the project accounts for BBMB to set aside, would not be in keeping with the express construction and purport of the LOU. It clearly envisages that there have to be monies available in the project accounts which are not due to it, before such monies may be set aside. Again the submission that insufficient monies does not allow BBMB to avoid adherence with the LOU because the LOU does not expressly state that insufficient monies would exonerate it, is not tenable because it would strain the reasonable construction to be accorded to the words used in the LOU to so extend the undertaking.

[51] In accordance with the law relating construction of contracts, the LOU is to be accorded its natural and ordinary meaning given the context and factual matrix of the contract. In *Michael C Solle v United Malayan Banking Corporation* [1986] 1 MLJ 45, Hashim Yeop Sani FCJ said at p 46 as follows:

> The principles of construction to be applied to the undertaking are similar to those applied to an ordinary contract. The intentions of the parties are to be gathered from the language used. They are presumed to have intended what they said.

[52] The breach of an undertaking attracts damages in the same manner as a breach of contract (see *Tan Sri Khoo Teck Puat & Anor v Plenitude Holdings Sdn Bhd* [1994] 3 MLJ 777 at p 786). It is therefore correct to state that an undertaking is similar to that of contractual relationship.

[53] And how is the intention of parties ascertained? As stated by Lord Bingham of Cornhill in *Bank of Credit and Commerce International SA v Ali & Ors* [2002] 1 AC 251:

> To ascertain the intention of the parties the court reads the terms of the contract as a whole, giving the words used their natural and ordinary meaning in the context of the agreement, the parties' relationship and all the relevant facts

surrounding the transaction so far as known to the parties. To ascertain the parties' intentions the court does not of course inquire into the parties' subjective states of mind but makes an objective judgment based on the materials already identified.

[54] To this end, learned counsel for the plaintiff's submission that it was important to bear in mind the circumstances under which the LOU was made, namely as security for the contract sum is relevant. In short the meaning to be accorded to the LOU is to be contextual. This is indeed significant as pointed out by Lord Hoffman in *Jumbo King Ltd v Faithful Properties Ltd & Ors* [1999] 2 HKC 507:

The construction of a document is not a game with words. It is an attempt to discover what a reasonable person would have understood the parties to mean. *And this involves having regard not merely to the individual words they have used, but to the agreement as a whole, the factual and legal background against which it was concluded and the practical objects which it was intended to achieve*. Quite often this exercise will lead to the conclusion that although there is no reasonable doubt about what the parties meant, they have not expressed themselves very well. Their language may sometimes be careless and they may have said things which, if taken literally, mean something different from what they obviously intended. In ordinary life people often express themselves infelicitously without leaving any doubt about what they meant. Of course in serious utterances such as legal documents, in which people are supposed to have chosen their words with care, one does not readily accept that they have used the wrong words. If the ordinary meaning of the words makes sense in relation to the rest of the document and the factual background, then the court will give effect to that language, even though the consequences may appear hard for one side or the other. The court is not privy to the negotiation of the agreement — evidence of such negotiations is inadmissible — and has no way of knowing whether a clause which appears to have an onerous effect was a quid prop quo for some other concession. Or one of the parties may simply have made a bad bargain. The only escape from the language is an action for rectification, in which the previous negotiations can be examined. But the overriding objective in construction is to give effect to what a reasonable person rather than a pedantic lawyer would have understood the parties to mean. Therefore, if in spite of linguistic problems the meaning is clear, it is that meaning which must prevail.

[55] In the instant case, it is expressly stated, and not in dispute that the LOU afforded security for the payment to be received by the plaintiff as contractor in the Batu Pahat housing development project constructed by the owner, FB Development Sdn Bhd. As highlighted earlier, PW1 gave evidence that the plaintiff consented to being paid at the end of the project in terms of one lump sum, rather than progressively as a consequence of the security afforded by BBMB in terms of the BG as well as the LOU. The LOU was therefore of primary significance in causing the plaintiff to enter into the contract with FB Development Sdn Bhd. Bearing that purpose in mind, it appears that the LOU was designed to ensure that BBMB set aside from the

project monies whatever monies it could which was not at that time due to it, up to the sum of RM12,083,127.80.

[56] As submitted by learned counsel for the defendant, I agree that BBMB's duty to set aside monies was circumscribed or qualified by its right not to set aside monies due or owed to it from time to time. From this I comprehend that at any given point of time, BBMB was entitled to set aside monies then owed to it and if there was a balance, to then set aside those monies for the benefit of the plaintiff under the LOU. Defence counsel labeled BBMB's entitlement as a 'priority' and referred the court to several cases relating to the priority of debenture holders' interests as compared to different forms of taxes. It appeared to this court that the clear and unequivocal words in the LOU do not require reference to those cases. Suffice to state that in the factual matrix under which the undertaking was given namely as a security for the building works carried out by the plaintiff, BBMB undertook to set aside monies continuously, from a pool, after taking to its own account, monies then due to it. BBMB is clearly entitled under the express terms of the LOU to take for its own benefit, prior to setting aside monies for the plaintiff, monies then owed to it. 'Sums due to us from time to time' refers to moneys due and payable to BBMB at that point in time (see *Re Stockton Malleable Iron Co* (1875) 2 Ch D 101).

Issue (b): Whether there was sufficient funds in the project accounts to allow for/enable monies to be set aside for purposes of the LOU

[57] It will be recalled that BBMB by way of defence to the plaintiff's claim maintained, inter alia, that there were at all times insufficient funds in the project accounts to allow for monies to be set aside under the LOU. As outlined earlier the evidence adduced in court disclosed that between 28 February 1995 and 30 June 1999, a total of RM40,176,732.88 was deposited in the project accounts. Of this sum a total of RM40,681,633.81 was withdrawn. These figures are not in dispute. When DW1 was queried on these withdrawals, he was unable to state with any degree of certainty that these monies had been withdrawn to meet BBMB's prior claim for a debt then due. This is primarily because DW1 had no documents with him to establish:

(a) the existence of a debt then owed to BBMB;

(b) that such a debt had accrued due from time to time or continuously, such that BBMB had to withdraw the monies for payment to itself; and

(c) that as a consequence there were insufficient monies left to set aside.

[58] Learned counsel for the plaintiff sought to take DW1 through the accounts on a monthly basis to establish whether for any particular month, from the balance shown in the project accounts, DW1 had set aside any monies at all. Again DW1 maintained that these monies could not be set aside because they were owed to BBMB. However not a shred of evidence was adduced in support of this bare statement. DW1 stated that he was unable to produce any accounts as all the accounts had been surrendered to Danaharta. However no attempt was made to call anyone from Danaharta to produce the relevant accounts. As a consequence, apart from DW1's vehement statements that the monies were 'probably' taken towards payment of BBMB's debts, the court had no material from which to ascertain why withdrawals to the extent of RM40,681,633.81 had been made by BBMB.

[59] This is what DW1 stated in the course of cross-examination:

Q: If the monies are not required by the Bank and there are surplus funds in the accounts, would you agree that the monies should be set aside?

A: Yes.

Q: Do you agree that BBMB did not set aside any monies at all under the LOU?

A: Yes I agree because there is no extra money to set aside.

...

Q: I refer you back to page 141. This is a summary of all the accounts stated to be project accounts. Item 1 shows 28 February 1995 that there were withdrawals and deposits as shown and a balance of 384k. Can you verify this to be true? The statement of account is at page 143.

A: Yes it is according to the statement of accounts.

Q: Would you agree that as of 28 February there was a surplus balance of RM384k in the account?

A: No. The balance has yet to be utilized for the loan.

...

Q: On the assumption that the summary at page 141 reflects all the statements of account, with respect to the 384k, why wasn't it set aside for the purposes of payment under the LOU?

A: It is not a surplus amount because at this time, we are not taking into consideration the loan due. We were supposed to take the money towards repayment of the Safuan loan. So if you say that it is totally surplus, I do not agree. But that it was a balance, I agree. They are two different things. Surplus balance and surplus fund. It could not be confirmed as a surplus fund.

Q: You say could have been required to be set aside. As of 28 February 1995 was the money required or not?

A: Required.

Q: If it was required, why wasn't the money taken out?

A: Any money taken out from the project account must be confirmed by the Financial Advisor of the Bank at that time.

Q: So this 384k, when was it taken out for payment to BBMB?

A: I cannot confirm.

Q: Give me a rough time frame. How long did it take?

A: I can't say. When we get confirmation by the Head office the monies would be taken out for loan repayment.

Q: Are you suggesting irrespective of how much money is in the account, BBMB can just assume that this money is for themselves?

A: Yes.

Q: Are you suggesting also that BBMB can unilaterally decide when to set aside the monies under the LOU?

A: Yes.

Q: When did BBMB intend to set aside these sums?

A: Whenever the amounts due under the Safuan group is already satisfied then the Bank will set aside whatever balance.

Q: You are unable to tell me how much is due every month or every year?

A: No. For the repayment every month. But to confirm the figure I cannot.

Q: Apart from what you are telling me now, you have no documentary proof that this amount was required for repayment to BBMB?

A: At this moment. Under the project accounts, the monies would be utilised to pay parties approved by the Bank and the financial advisor of the Safuan Group. So once both parties approve the monies would be taken out of the project account. This would include the principal and borrowings of the Safuan Group.

Q: Can you confirm that your answer would be similar for all the balances on page 141. Same explanation as to why the balances were not set aside?

A: Yes. It was utilized to pay off other parties to whom monies were due.

[60] From this exchange it is evident not only that the defendant produced not an iota of evidence to show that the monies withdrawn were for the purposes of repayment of BBMB's debts then falling due, but also shows that monies were withdrawn for payments to parties other than BBMB.

[61] When DW1 was questioned as to the lack of documents produced in support of his averments, he replied that under the vesting order with Danaharta, all documents were given to Danaharta. As a consequence there being no documents with BBMB, he was unable to produce any evidence to

support his averments. It is telling however that Danaharta was not called to provide the requisite accounts. In the absence of any documentation and bearing in mind the defendant's failure to subpoena anyone from Danaharta to produce the requisite accounts, the only conclusion that the court can come to is that the defendant has failed, on a balance of probabilities to establish that the monies that were withdrawn from the project accounts were indeed utilised to pay monies due or required to be applied in payment of sums due to BBMB from time to time.

[62] In this context the production of a global accounts showing that the Safuan Group owes BBMB a sum in excess of RM420m does not discharge the onus falling on the defendant to prove that the monies withdrawn were utilised for repayment of monies then due to BBMB. While the burden lies always with the plaintiff to prove its case, the onus shifts between the parties in the course of trial. The LOU provides that BBMB only had to set aside monies from the project accounts which were not due to it from time to time. Only BBMB itself would be in a position to state or establish how much was due to it from time to time. As that evidence is peculiarly within the knowledge of BBMB, it falls upon BBMB to prove the same (see s 103 of the Evidence Act 1950). If the relevant documents were not with BBMB, it was open to the defendant to subpoena or adduce evidence from Danaharta to establish that monies were only deducted towards BBMB's debt as and when such debt fell due. This was not done. In these circumstances, it appears to the court that the defendant has failed to establish that the monies withdrawn from the project accounts between February 1995 and June 1999 were indeed utilised towards repayment of monies due to BBMB. In these circumstances, the failure of BBMB to set aside monies for the plaintiff amounts to a breach of the LOU.

[63] It further transpired in the course of the cross-examination of DW1 that BBMB failed to set aside monies from balances available at the end of each month during the material period, because it needed to reserve such balances for monies due to BBMB the following month. This is what DW1 said:

> Q: You observe at the bottom of this statement (for March 1995) there is an amount of RM161k. If BBMB has taken out monies due to them for that month, and there is still a balance of RM161k, shouldn't this amount have been set aside for the LOU?
>
> A: Maybe not.
>
> Q: Why not?
>
> A: As I said earlier, some of them would be due or will be due in the early part of the month. If you reserve this amount or take it out for this purpose, there could be no available amount to be paid for interest due or loan due.

Q: What you are saying now suggests that you do not only set aside payments which are due to the Bank but also payments which are going to be due to the Bank.

A: Yes.

...

Q: You agree it doesn't include advance payments? Would you agree that the Bank kept aside payments not only for sums due but also for payments going to be due?

A: Yes.

Q: Your answer appears to be contradictory. You say that under the LOU it only concerns amounts due but you then state that it also applies to sums that are going to be due. In other words, the Bank kept aside monies not only due but also monies going to be due?

A: Yes.

[64] DW1 agreed that notwithstanding that monies were not yet due to BBMB, it nonetheless did not set aside any monies from the balances available as these monies were reserved for monies that would fall due in the future. The LOU does not however allow or provide for BBMB to deduct monies other than that which is due, ie that is owing at that point in time. The failure to set aside monies for the plaintiff from the balance available in the project accounts, which was apparently reserved for monies falling due in the future, amounts to a breach of the terms of the LOU.

[65] In summary, the defendant failed to show that the monies withdrawn by BBMB were monies due to it from time to time. This is because the defendant produced no accounts or other evidence to show the nature or purpose of the withdrawals from the project accounts. Further, the defendant conceded that no monies were set aside as required by the LOU, as BBMB chose to reserve such balances as there were for future sums due to it. As such it follows that BBMB and thereby the defendant is in breach of the express terms of the LOU. The plaintiff has proved its case on a balance of probabilities.

Issue (c): If the defendant was in breach of the LOU was there a break in the chain of causation disentitling the plaintiff to damages for such breach?

Issue (d): The plaintiff's failure to mitigate loss

[66] These two issues arise for consideration by reason of learned counsel for the defendant's submissions. He contended that even if it were to be found that the defendant had acted in breach of the LOU, as is indeed the

case, the plaintiff was not entitled to be awarded damages for the following reasons:

(a) the plaintiff's conduct was so unreasonable that it broke the chain of causation;

(b) the loss suffered by the plaintiff is too remote; and

(c) the plaintiff had unreasonably failed to mitigate its loss to any extent.

[67] Reliance was placed on s 74 of the Contracts Act 1956 to submit that:

(a) only loss which naturally arose from the breach could be claimed; and

(b) loss which is remote or indirect cannot be claimed.

[68] On the issue of the break in the chain of causation it was submitted that even if the plaintiff had suffered a loss the cause of such loss had to be examined to determine whether it flowed from the defendant's breach of the LOU or from some other conduct, albeit of a third party or someone else. In the instant case the defendant submitted that the following facts amounted to a break in the chain of causation precluding the plaintiff from claiming damages:

(a) PW1 was continuously told by the defendant that there were no funds in the project accounts. However this was only after completion of the project and after a claim had been made for the final contract sum;

(b) the plaintiff was prepared to accept the sum of RM48.9m in full and final settlement of the bank guarantee on the grounds that the defendant had financial issues and that there was apparently an 'arrangement' for payment in stages;

(c) the full sum could have been claimed under the BG because it was less than the sum guaranteed;

(d) the plaintiff had only looked to the defendant for payment, not to FB Development. No demand was made on FB Development. Bearing in mind these facts by way of background the defendant submitted that had the plaintiff insisted on the amount demanded under the BG, its claim would have been extinguished without recourse having to be had under the LOU. Instead the plaintiff 'chose' not to insist on full payment but settled under the BG for a lesser sum. The defendant maintained that the evidence of payment in staggered stages was implausible. There was no legal impediment to the plaintiff claiming the full sum under the BG. As such it appears that the plaintiff had willingly settled the claim on the guarantee for RM48.9m. The defendant contends that a break in the chain of causation arises by reason of the plaintiff's failure to make a demand against FB

Development Sdn Bhd and in agreeing to a settlement for a lesser sum under the letter of guarantee. Such 'unreasonable' conduct on the part of the plaintiff, it was maintained, was sufficient to break the chain of causation (see *Beoco Ltd v Alfa Laval Co Ltd & Anor* [1995] QB 137 and *Sri Minal Construction Sdn Bhd v Hong Kong Bank Malaysia Berhad* [2007] 7 MLJ 367; [2007] 9 CLJ 579).

[69] With great respect to learned counsel for the defendant, I was unable to appreciate the applicability of the aforesaid cases to the instant case. The instant case deals with a specified claim for money (that sum having been fixed by the architect pursuant to the employment contract and the issuance of the CPC) pursuant to a breach of the LOU. In the event of a breach the amount to be claimed has been fixed by reason of the existence of the architect's CPC which specifies the amount due to the plaintiff, which sum is not in dispute. In short there is no reason to assess damages here. The defendant is either in breach or not in breach. If the defendant is in breach of the LOU, the liquidated claim due under the LOU is RM9,729,592.89. If the defendant is not in breach of the terms of the LOU, then the plaintiff is not entitled to the said sum. Both the cases cited above deal with claims for damages to be assessed as a consequence of breaches of warranty or contract and/or a breach of a duty of care arising in tort. In such cases, the issue of the assessment of damages under s 74 of the Contracts Act or applying the test of remoteness of damages in tort, is relevant. Not so here where the claim is for a liquidated sum.

[70] Even if I am wrong in so concluding, the defendant's submission appears to suggest that notwithstanding the breach by the defendant, the plaintiff is not entitled to claim the sum of RM9,729,592.89 under the LOU by reason of its failure to insist on its full legal rights under the bank guarantee. The voluntary surrender of its rights under the BG, whereby the plaintiff settled its claim for the final contract sum for RM48.6m amounts to a break in the chain of causation precluding the plaintiff from being entitled to the balance RM9,729,592.89 under the LOU. I am unable to agree with this submission for the following reasons:

(a) the defendant contends that PW1's evidence that he agreed to take a lesser sum under the BG and agreed to wait for a staggered payment at a later date is not credible. The defendant however produced no evidence to counter PW1's evidence on this point. Neither was PW1 challenged in cross-examination on this point. In the absence of either contrary evidence or a clear challenge in cross-examination it is not possible to discredit or treat as not credible, PW1's evidence on this issue. Moreover PW1's evidence was not inherently incredible. He testified that given the financial crisis of 1998 which had affected most banks including BBMB, he was prepared at that point to accept on

behalf of the plaintiff the lesser sum of RM48.6m. This sum was accepted in full and final settlement of the BG. However he maintained that he only accepted this arrangement on condition that the balance sum would be paid at a later stage. The plaintiff then made a demand on the letter of undertaking on 18 May 1999 pursuant to issuance of the CPC. Given this clear evidence I could not, and did not accept the defendant's submission that PW1's evidence on this point was untenable. In other words, I accepted PW1's evidence that the agreement he reached with BBMB was that the RM48.6m was in full and final settlement of the BG only, and that the balance sum would be paid at a later date on a staggered basis. Hence the plaintiff was entitled to make such claim as it did under the LOU;

(b) the plaintiff's alleged 'failure' to insist on its strict legal rights under the BG for payment of the full sum in order to assist BBMB when it was, like other banks in 1998, suffering difficulties does not appear to create or form a 'break in the chain of causation' as contended. It cannot be said that the plaintiff's agreement to wait for full payment amounted to an 'intervening' act which could thereby be held accountable for the balance sum. It would be perverse to hold that the plaintiff is to be penalised for agreeing to wait for its final payment;

(c) I also accept PW1's evidence that he would not have accepted the RM48.6m save for the chief operating officer, Dato' Halim's assurance that the balance sum would be paid in due course; and

(d) finally the claim for RM9,729,592.89 did not appear to be too remote as this is the contractually specified loss under the security, the LOU.

[71] For these reasons, I was unable to accept the defendant's line of submissions to the effect that there was a break in the chain of causation by reason of the plaintiff's own conduct disentitling it to the sum claimed.

[72] As for a failure to mitigate its loss, learned counsel for the defendant maintained that there can be no recovery for loss which the plaintiff ought to have avoided. As outlined above, the defendant submitted that the plaintiff could have avoided this loss by insisting on payment of the full contract sum under the guarantee in 1999. Again as the plaintiff's claim is for a specified or liquidated sum under a letter of undertaking, the issue of mitigation does not arise. Even if I am wrong, the conduct of the plaintiff which resulted in detriment to itself so as to assist BBMB, the debtor at that point in time, does not amount to a failure to mitigate its loss. For the same reasons as outlined above, I am unable to agree with learned counsel for the defendant that the plaintiff failed to mitigate its loss, thereby disentitling it to its claim.

Issue (e): Whether the plaintiff is entitled to claim the sum of RM9,729,592.89 from the defendant under the irrevocable letter of undertaking

[73] In the course of this judgment, I have considered the construction to be placed on the LOU and the factual matrix surrounding the matter. It is not in dispute that the LOU was a part of the security provided by BBMB in consideration of the plaintiff carrying out the construction works for the Banang Heights Project at the behest of its employer, FB Development Sdn Bhd. I concluded that under the terms of the LOU, the plaintiff was entitled to receive from BBMB on the payment date, ie 14 days from the issuance of the certificate of practical completion a sum not exceeding RM12,083,127.80, in the instant case RM9,729,592.89 being the balance of the final contract sum less the retention sum. This sum of money was to have been paid to the plaintiff from monies set aside by BBMB from time to time or continuously, from the project accounts, after BBMB had set aside monies due to it. As outlined above monies were paid into the project accounts. All these monies were withdrawn. However no monies were set aside towards the plaintiff's account as envisaged under the LOU. Neither was the defendant able to provide any evidence to establish that the monies that were withdrawn were utilised towards the payment of monies due to BBMB. The defendant did not produce any documentary evidence to substantiate how the monies withdrawn were utilised. The only evidence produced was a statement to the effect that the Safuan Group owed BBMB the sum of RM421m. The court was to infer from the existence of this debt that the monies that were withdrawn were utilised towards payment of that debt. However DW1 in the course of his testimony was unable to confirm this. He in fact stated that monies were paid not only to BBMB, but also to third parties. He also confirmed that even when there were balances available in the project accounts, no monies were set aside for the plaintiff as those monies were reserved for monies that would fall due in the future to BBMB. By reason of these matters, BBMB and thereby the defendant acted in breach of the terms of the LOU. The onus lies on the defendant to show that it applied the monies it withdrew towards the payment of monies due to BBMB. The defendant has failed to discharge that onus. As a consequence the defendant has failed to show that it utilised the monies for payments to BBMB in respect of sums owed to BBMB. It therefore follows that if the defendant is unable to show that the monies were rightfully utilised for payments due to BBMB, that the monies ought to have been set aside for the benefit of the plaintiff. The total monies deposited over the years 1995 to 1999 was in the region of RM40.6m. If monies had been set aside as required under the LOU, DW1 conceded that there would have been sufficient funds to meet the plaintiff's claim. Accordingly the plaintiff has proved that it is entitled under the terms of the LOU to receive the sum of RM9,729,592.89 14 days

from the date when it made its claim on 18 May 1999.

SUMMARY

[74] In summary, it appears to this court that:

(a) the construction to be accorded to the LOU in accordance with the established principles of the construction of contracts is that BBMB undertook to set aside from the project accounts, from time to time or continuously, monies not required to be utilised in payment of sums then payable to it;

(b) a total sum of approximately RM40.681m was deposited in the project accounts but no moneys whatsoever were set aside by BBMB;

(c) a total sum of RM40.176m was withdrawn from the project accounts;

(d) the defendant failed to provide any evidence that the monies withdrawn above were utilised in payment of monies due to BBMB, save for a bare averment to that effect. DW1 was unable to confirm with any degree of certainty that the monies deducted were utilised towards payment of monies then due to BBMB. In this context the production of accounts after the material period, showing a debt due to BBMB from the Safuan Group amounting to RM421m does not discharge the onus of proof on the defendant;

(e) in the absence of evidence from the defendant showing that the monies were utilised towards payment of monies due to BBMB, it follows that the defendant has failed to prove that it acted in accordance with the terms of the LOU. Accordingly the defendant is in breach of the terms of the LOU for failing to set aside monies from time to time towards payment of the sum specified therein;

(f) the defendant's contention that even if it is in breach, the plaintiff is not entitled to damages or the sum claimed because of a break in the chain of causation or its failure to mitigate its loss is untenable; and

(g) the plaintiff has proved its claim on a balance of probabilities.

[75] The plaintiff is therefore granted judgment in terms of prayers (a), (b) and (c) of the amended statement of claim. For avoidance of doubt, the plaintiff is granted judgment in the sum of RM9,729,592.89 together with interest on the judgment sum at the rate of 8%pa from the date when payment was due until the date of settlement and costs.

Plaintiff's claim allowed with costs.

Reported by Kanesh Sundrum